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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1975

Nos. 75-567 & 75-577
(Consolidated)

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

REPLY BRIEF OF STATE OF WASHINGTON, AMICUS CURIAE

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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STATEMENT OF INTEREST ON QUESTIONS PRESENTED

Pursuant to Rules 40(4) and 42(5), the State of Washington replies to the two questions framed by Corvallis Sand and Gravel Company:[1]

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[1]The Court granted petitions for certiorari filed by the State of Oregon and the Corvallis Sand and Gravel Company on January 12, 1976. Both petitions were consolidated for hearing. Our opening brief was, therefore, directed solely to the question presented by

"Does plaintiff, State of Oregon, have sufficient ownership to maintain statutory ejectment to recover possession of the bed of a navigable fresh water stream where its claim of ownership is based on sovereignty rather than grant and where there is no allegation pleaded and no proof that the public rights of navigation, fishery and related uses are being impaired or interfered with by defendant Corvallis Sand and Gravel Company?"

"Does plaintiff, State of Oregon, have sufficient ownership to maintain statutory ejectment to recover damages for the removal of sand and gravel from the bed of a navigable fresh water stream where its claim of ownership is based on sovereignty rather than grant and where there is no pleaded allegation or proof that the public rights of navigation, fishery and related uses are being impaired or interfered with by the defendant Corvallis Sand and Gravel Company?"[2]

We are filing this reply brief to address arguments made by Corvallis to which we yet have not had the opportunity to respond. Washington's deep-seated interest in this case has been stated.[3] Our present concern is limited to the possible imposition of the rationale of *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313 (1973) upon Washington's law which does not recognize "riparian" rights.

ARGUMENT

A. The Equal Footing doctrine comprehends the beds of fresh water navigable streams.

Oregon's petition. We indicated that a separate brief would be filed on the questions presented by Corvallis in Cause No. 57-577 in accordance with the briefing schedule set by the Clerk. (Brief Amicus Curiae of the State of Washington, p. 2, ft.nt. 2)

[2]Petition For A Writ of Certiorari filed by Corvallis Sand and Gravel Company, Docket No. 75-577, pp. 2-3.

[3]Washington Brief, *amicus curiae*, pp. 1-7 and Appendix A.

Corvallis asserts that a state's proprietary interest is limited to the beds of tidal waters and does not encompass the beds of fresh water navigable streams.[4] This contention has been fully answered on a number of occasions by the Court. A recent decision is illustrative. *Texas v. Louisiana*, 410 U.S. 702, 713 (1973) states:

> "It is the unquestioned rule that States entering the Union acquire title to the lands under navigable streams and other navigable waters within their borders. (Citing Cases)"

Earlier decisions of similar import are *Shively v. Bowlby*, 152 U.S. 1 (1894); *Barney v. Keokuk*, 94 U.S. 324, 338 (1876); and *Pollard's Lessee v. Hagen*, 44 U.S. (3 How.) 212, 227-229 (1845).

The foregoing cases are, of course, merely illustrative and not exhaustive. Many more could be cited. The point is simply that the beds of fresh water navigable streams were not granted by the Constitution to the United States nor to a riparian owner. Such aquatic lands were reserved to the original 13 states which formed the Union and to subsequently admitted states formed out of territory held by the United States. The principle fully applies in this case.[5]

[4]Corvallis Opening Brief, pp. 5-6, 15-25.

[5]Corvallis apparently concedes that this principle is firmly imbedded in our Constitutional firmament. At page 44 of their opening brief, the following statement appears:

"For two centuries state courts, *with the approval of this* [C]*ourt*, have in many jurisdictions retroactively severed from the riparian the rights of property which are properly his." (Emphasis Supplied)

Washington submits that such a radical disruption of well-settled law as contended by Corvallis is not justified. Moreover, such questions are left to the states to resolve. *Iowa v. Rood*, 187 U. S. 87, 93 (1902).

B. **A new federal common law test of determining a state's title to aquatic lands beneath navigable waters should not be adopted.**

As we pointed out in our opening brief (pp. 7-14), the paramount issue involves whether a federal question is presented in this case. Without abandoning our reasoning that no federal question exists, we submit that the newly fashioned federal common law test of state ownership of aquatic lands is predicated upon erroneous premises. *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 323, ft.nt. 15 (1973).

Corvallis contends that there is a need to devise a uniform rule superseding the variety of state law methods of resolving this sort of title dispute. (Corvallis Opening Brief, pp. 34-35). A perceived "need for uniformity" ought to be based upon a well-defined federal right.[6] Under the facts of this case, we submit that no federal right exists. Corvallis has not identified such a claimed federal right.[7]

Ancillary to the foregoing proposition is the notion that the *Bonelli* formulation fits the non-riparian status of Washington. We submit that it does not. The Court has recognized Washington's unique status among the states in *Port of Seattle v. Oregon & Wash. Ry. Co.*, 255 U.S. 56, 64 (1921):

> "Under the law of Washington (which differs in this respect from the law generally prevailing elsewhere) a conveyance by the State of up-

[6]See: *Miskin, The Variousness of 'Federal Law': Competence in Discretion in the Choice of National and State Rules for Decisions*, 105 U. Penn. L. Rev. 797 (1957).

[7]The brief of California and the other states, *amici curiae*, pp. 26-32, presents cogent arguments against the adoption of a uniform federal rule. Washington concurs with the views of our sister states.

> lands abutting upon a natural navigable waterway grants no right of any kind either in land below high water mark, *Eisenbach v. Hatfield*, 2 Washington, 236; or in, to, or over the water.
> * * *
> "So complete is the absence of riparian or littoral rights that the State may—subject to the superior rights of the United States—wholly divert a navigable stream, sell the river bed and yet have impaired in so doing no right of the upland owners whose land is thereby separated from all contact with the water. (Citing Cases)"[8]

The absence of riparian rights in Washington does not square with the rationale of *Bonelli* (p. 326, 328, 329) that a diminishment in the quality of a riparian's estate by river movement or the possible imposition of a noncompensable loss of riparian character of the uplands *requires* the fashioning of a new equitable rule to establish title. Under Washington law, there is no "quality of being *riparian*." (*Bonelli*, p. 326) *Port of Seattle, supra*, should be dealt with if the Court opts for continued adherence to the *Bonelli* rule. There is nothing left to analyze in terms of balancing an upland owner's nonexistent riparian right (under Washington law) against the "limited nature of the sovereign's rights in the riverbed." (*Bonelli*, p. 328). Even a "limited" right out-

[8]The law in Washington consistently has been non-recognition of riparian rights, e.g., *Ghione v. State*, 26 Wn.2d 635, 175 P.2d 955 (1946); *Harris v. Hylebos Indus. Inc.*, 81 Wn.2d 770, 773-776, 505 P.2d 457 (1973).

Since admission into the Union, Washington has treated its submerged and adjacent shorelands in accordance with the non-riparian doctrine. Sales, leases and management of such aquatic lands have been predicated upon the assumed validity of the absence of riparian rights appurtenant to abutting uplands since 1889.

weighs a nonexistent right under the balancing approach mandated by *Bonelli.*

CONCLUSION

As demonstrated in our opening brief, there is no federal question presented under the facts of this case.

Alternatively, we submit that the rationale stated by the Court in *Bonelli Cattle Co. v. Arizona,* 414 U.S. 313 (1973) does not take into account Washington's unique status as a non-riparian state. At the minimum, Washington's long-standing and uniform application of its laws should not, by implication, be destroyed by an uncritical extension of *Bonelli* into this domain.

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